Supreme Court, U.S.
FILED

No. 05-350 SEP 14 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GERALD O. BAILEY, *for himself and on behalf of*, UNITED STATES OF AMERICA, STATE OF COLORADO, *and* MONTEZUMA COUNTY BOARD OF COMMISSIONERS,

Petitioners,

v.

SHELL WESTERN E&P INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT ERRED IN FAILING TO PREVENT THE UNAUTHORIZED EXPANSION OF JURISDICTION BY THE DISTRICT COURT.

II. WHETHER THE FIFTH CIRCUIT ERRED IN FAILING TO ORDER TRANSFER TO THE COLORADO DISTRICT COURT TO PROTECT THAT COURT"S EXCLUSIVE *QUI TAM* JURISDICTION.

III. WHETHER THE FIFTH CIRCUIT ERRED IN FAILING TO ORDER TRANSFER TO THE COLORADO DISTRICT COURT TO PROTECT THE INTREGRITY OF THE "LOCAL ACTION" RULE.

IV. WHETHER THE FIFTH CIRCUIT ERRED IN FAILING TO PREVENT THE INTERFERENCE BY THE TEXAS DISTRICT COURT WITH THE EXCLUSIVE JURISDICTION OF THE COLORADO DISTRICT COURT.

LIST OF PARTIES

PETITIONERS:

Gerald O. Bailey

United States of America

State of Colorado

Montezuma County Board of Commissioners

RESPONDENTS-PLAINTIFF:

Shell Western E&P Inc.

RESPONDENTS-DEFENDANT:

Bridwell Oil Company

STATEMENT PURSUANT TO RULE 29.6

None of the Petitioners are in corporate form.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Appendices	iv
Table of Authorities	v
Opinions Below	1
Jurisdiction of the Supreme Court	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. Certiorari Is Required To Prevent The Unauthorized Expansion Of Federal Court Jurisdiction	5
II. Certiorari Is Required To Protect The Statutory Authority For *Qui Tam* Cases Contained In 31 U.S.C. § 3730(b)(5)	7
III. Certiorari Is Needed To Protect The Integrity Of The Local Action Rule Of 28 U.S.C. § 1392	9
IV. Certiorari Is Needed To Prevent Interference By The Texas Court With The Jurisdiction of The Colorado District Court	10
Conclusion	12

TABLE OF APPENDICES

Page

Appendix A – Order of the United States Court of Appeals for the Fifth Circuit Filed June 3, 2005 ..... 1a

Appendix B – Order of the District Court for the Southern District of Texas dated April 1, 2005 ..... 2a

Appendix C – Order of the District Court for the Southern District of Texas dated April 12, 2005..... 3a

Appendix D – Letter from the Hartnett Law Firm dated May 27, 2005 ..... 5a

Appendix E – Excerpts from June 7, 2005 Hearing Transcript 7a

Appendix F – Order of the District Court for the Southern District of Texas entered June 9, 2005 ..... 20a

Appendix G – Order of Consolidation of the District Court for the Southern District of Texas entered July 19, 2005 ..... 22a

Appendix H – Order of the United States Court of Appeals for the Fifth Circuit Filed June 22, 2005..... 23a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 6, 7

Branson School District v. Romer, 161 F.3d 619 (10th Cir. 1998) 8

Colorado v. City of Littleton, 515 P.2d 1121 (Colo. 1973) 8

Colorado v. East Lake Creek Ranch, LLP, 31 P.3d 886 (Colo. 2001) 8

Hayes v. Gulf Oil Corporation, 821 F.2d 285 (5th Cir. 1987) 9, 10

Minichiello Realty Associates, Inc. v. Britt, 460 F.Supp. 896 (D. N.J. 1978), *affirmed*, 605 F.2d 1196 (3rd Cir. 1979) 9

Sutter Corp. v. P & P Industries, Inc., 125 F.3d 914 (5th Cir. 1997) 8

United States, ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214 (D.C. App. 2003) 7

West Gulf Maritime Association v. ILA Deep Sea Local 24, 751 F.2d 721 (5th Cir. 1985) 8

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1392 ..... 1, 2, 9

28 U.S.C. § 1631 ..... 1, 10

31 U.S.C. § 3730 ..... 7, 10

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. § 3730(b)(3) 2, 3, 10

31 U.S.C. § 3730(b)(5) 2, 7, 9, 11

Col. Rev. Stats. § 6-4-109 8

Col. Rev. Stats. § 6-2-111 8

Federal Rule of Civil Procedure 11(b) 6

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit dated June 3, 2005 is set forth in Appendix A, 1a. The Order of the United States Court of Appeals for the Fifth Circuit dated June 22, 2005 is set forth in Appendix H, 23a. The transcript excerpts of the June 7, 2005 hearing are reprinted in Appendix E, 7a. The Orders of the U.S. District Court for the Southern District of Texas are reprinted at 2a, 3a, 20a, 22a and 23a.

JURISDICTION OF THE SUPREME COURT

The Order of the Court of Appeals that denied Rehearing En Banc was entered on June 22, 2005. The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory Issues

28 U.S.C. § 1392

Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

28 U.S.C. § 1631

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to

any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

31 U.S.C. § 3730(b)(3)

The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

31 U.S.C. § 3730(b)(5)

When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based upon the facts underlying the pending action.

STATEMENT OF THE CASE

On April 9, 2004, a False Claim Act Complaint (***"Qui Tam Complaint"***) was filed in the United States District Court in Colorado against Kinder Morgan CO2 Company, L.P. ("Kinder Morgan") and Richard Timothy Bradley. The case was filed in Colorado because it was of a local nature involving the McElmo Dome Unit located in Colorado. 28 U.S.C. § 1392. There are three relators in the action. Mr. Bailey was one of the relators. The action was brought by

relators as overriding royalty interest owners in the McElmo Dome Unit for themselves and on behalf of the United States, Colorado and Montezuma County, Colorado. The United States, Colorado and Montezuma County own real property and royalty interests in the McElmo Dome Unit. The Unit is located entirely within Montezuma and Dolores Counties, Colorado. The Unit was created in 1983 under Colorado law. The ***Qui Tam Complaint*** covered violations for the period beginning in March of 2000 when Kinder Morgan became Unit Operator of the Unit after purchasing the Shell interests. As required by statute, the ***Qui Tam Complaint*** was filed in camera and assigned to Judge Walker Miller. Additional materials were filed under seal and the period of secrecy extended by Judge Miller. 31 U.S.C. § 3730(b)(3).

On June 15, 2004, three months after the Colorado action was filed, Mr. Bailey asserted federal false claims involving McElmo Dome for the period 1984 to March 2000 against Shell Western E&P Inc., Shell CO2 Company, Ltd. and Shell Oil Company ("Shell"). The claims were compulsory counterclaims in the case brought by Shell against Mr. Bailey in a Texas State court. The counterclaims were filed under seal as Defendant Gerald O. Bailey's Eighth Amended Counterclaims (***"qui tam counterclaims"***). The ***qui tam counterclaims*** remained under seal until November 29, 2004 when the court ordered service on Shell after the United States declined intervention. Shell was served on December 6, 2004. Shell filed no responsive pleading to the ***qui tam counterclaims***. After Shell injected Kinder Morgan into its state case on March 11, 2005, the case was removed to federal court.

Bailey removed Shell's state case to federal court in Houston, Texas on March 24, 2005. On March 31, 2005 Shell filed, and mailed to Bailey by certified mail, a Motion to Unseal Supplemental Notice of Removal. The Supplemental Notice of Removal was filed under seal because it contained pleadings filed under seal by the United States in the Colorado case involving Kinder Morgan. The following morning of April 1, 2005, the district court ordered Bailey to deliver a copy of the sealed documents to Shell by 3:00 p.m. on April 1, 2005. 2a. Neither Bailey nor his counsel had seen a copy of Shell's motion yet. On April 1, 2005, Mr. Bailey's counsel was called by Shell's counsel to participate in a hearing in which the Texas district court told Shell's counsel that a secret false claim action had been filed in Denver, Colorado.

At an April 7, 2005 hearing, the Texas district court ordered counsel for Bailey to file a motion with the Colorado district court to transfer the Colorado case involving Bailey, Gray and Ptasynski to his court. The Texas court ordered Bailey's counsel to secure the agreement of Gray and Ptasynski to join Bailey's motion to transfer. The disclosure by the court of the identities of the Plaintiffs in the ***Qui Tam Complaint*** violated the Colorado district court's Seal of secrecy. At a June 7, 2005 hearing, the Texas Judge unsealed the document in his court that continues under seal by Order of the Colorado federal court. 9a-10a.

On April 7, 2005, the Texas court requested counsel for Bridwell Oil Company, Mr. Hartnett, to advise the court as to all other cases in which he was involved that dealt with McElmo Dome carbon dioxide and seek transfer of the state court actions to his court. The April 12, 2005 Order followed the hearing. 3a. As a result the Denton

case involving *Shores, et al. v. Exxon Mobil Corporation, et al.*, was filed as a new federal case in Houston, Cause No. 4:05-cv-10825. Mr. Hartnett requested instructions for the transfer of the case to Judge Hughes' court. 5a. The *Shores* case does not involve a federal question. The parties in the *Shores* case do not satisfy the requirements for diversity jurisdiction since both the plaintiffs and Exxon Mobil are Texas residents. At the Texas district court's June 7, 2005 hearing, all parties agreed that no federal question or diversity jurisdiction was involved in *Shores*. 12a-16a. Mr. Bailey's counsel objected for lack of jurisdiction (12a); and Shell's counsel objected to consolidation and urged intervention instead. 13a. Mr. Hartnett admitted there was no federal question or diversity jurisdiction in the case. 14a-15a. On July 19, 2005, the Texas district court consolidated the *Shores* case with this case. 22a.

On May 27, 2005, Mr. Bailey filed a Petition for Writ of Mandamus for himself and on behalf of the United States, Colorado and Montezuma County. The Petition was denied on June 3, 2005. 1a. The Petition for Rehearing En Banc was denied June 22, 2005. 23a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Required To Prevent The Unauthorized Expansion Of Federal Court Jurisdiction.

Shell did not sue Mobil Oil Corporation or the plaintiffs in the *Shores* case in this case. Mobil Oil Corporation and the *Shores* plaintiffs do not have an interest in this case. 12a. Parties cannot agree to confer upon a court of the United States jurisdiction to decide a case. Unless the

Constitution or the laws of the United States allow litigation in federal court, no party has the right to have his case decided in federal court. In this case, lawyers knew the *Shores* case lacked federal court jurisdiction before consolidation with this case. Counsel for the *Shores* plaintiffs candidly told the Texas district court the case lacked federal court jurisdiction. 13a-14a. Mr. Bailey's counsel objected to the lack of jurisdiction. 12a. Shell's counsel admitted there was no diversity jurisdiction or federal question jurisdiction and urged intervention in the case instead. 13a.

Rules established by this Court prohibit lawyers appearing before federal courts from presenting or advocating claims or legal or factual contentions that the lawyers know, or should know, are not supported by the evidence or existing law, or by a nonfrivolous argument for the extension of existing law. The standard required of lawyers is contained in Rule 11(b) of the Federal Rules of Civil Procedure. Shell's counsel failed the standard when it advocated including the *Shores* case with this case when it knew, in advance, federal court jurisdiction was lacking.

Existing law is clear that jurisdiction of federal courts is to be carefully guarded against expansion by judicial interpretation or by prior action or consent of parties. This Court previously reversed a decision of the Fifth Circuit regarding the jurisdictional issue in question in this case. This Court advised the Fifth Circuit that jurisdiction in federal courts is limited and cannot be obtained by consent, waiver or estoppel. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

The Texas district court lacked jurisdiction to compel the transfer of state cases involving state law between

Texas residents to federal court. The April 12, 2005 Order (3a) calling for moving the parties from State actions in Dallas and Wichita Falls, Texas to the Houston federal court constitute an improper extension by judicial interpretation of federal court jurisdiction. The transfer and consolidation of the state case involving the *Shores* plaintiffs and Exxon Mobil extended federal jurisdiction to a State case that Congress has forbidden to federal courts. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

II. Certiorari Is Required To Protect The Statutory Authority For *Qui Tam* Cases Contained In 31 U.S.C. § 3730(b)(5).

Certiorari is required to protect the statutory "first to file" rule contained in 31 U.S.C. § 3730(b)(5). The Colorado federal court has sole jurisdiction of any actions based upon facts underlying the ***Qui Tam Complaint*** by reason of 31 U.S.C. § 3730. Any claims or action by Kinder Morgan regarding the facts underlying the ***Qui Tam Complaint*** must be heard in Colorado. Under the statutory first to file rule contained in the False Claims Act only the Government may intervene or bring a related action. Kinder Morgan was barred from bringing any claims in Houston by the statutory provisions of the False Claims Act. Any claim brought by anyone else based upon the facts underlying the ***Qui Tam Complaint*** is barred and must be dismissed or transferred to the Denver Court. *United States, ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214 (D.C. App. 2003).

The ***Qui Tam Complaint*** involves payment of carbon dioxide royalties to the United States as a steward for citizens of the United States, but the primary beneficiaries are Colorado citizens as half of the MMS royalties received

are shared with Colorado. Furthermore, Colorado and Montezuma County suffered damages for the unpaid taxes owed for the pricing violations. The ***Qui Tam Complaint*** and the ***qui tam counterclaims*** assert claims and remedies on behalf of Colorado for Colorado trust lands located in Colorado. The lands are managed by, and the leases issued by, the Colorado Land Board. Colorado law requires proceeds from the leases to be used only for support of common schools in Colorado. *Colorado v. City of Littleton,* 515 P.2d 1121 (Colo. 1973). Colorado's Constitution forbids altering or reducing the amounts for education generated from the management of school trust lands. *Colorado v. East Lake Creek Ranch, LLP,* 31 P.3d 886 (Colo. 2001) and *Branson School District v. Romer,* 161 F.3d 619 (10th Cir. 1998). Colorado claims for violations of the Colorado Antitrust Act and the Colorado Unfair Practices Act require injunctive and equitable relief with jurisdiction in Colorado courts. Col. Rev. Stats. §§ 6-4-109 and 6-2-111. Texas courts are strangers to these matters.

Certiorari is appropriate as the Fifth Circuit failed to follow the "first to file" comity rule. The Fifth Circuit follows the long recognized principle that federal district courts – courts of coordinate jurisdiction and equal rank – should exercise care to avoid interference with each other's affairs. *Sutter Corp. v. P & P Industries, Inc.,* 125 F.3d 914 at 917-918 (5th Cir. 1997) and *West Gulf Maritime Association v. ILA Deep Sea Local 24,* 751 F.2d 721 at 728-729 (5th Cir. 1985). In this case the Colorado district court acquired jurisdiction over Kinder Morgan claims in April 2004. It was not until March 2005 that the Texas federal court became involved and transfer to Colorado was requested. Certiorari is needed to prevent conflicts between

the Fifth and Tenth Circuits created by the failure to comply with the first to file rule. 31 U.S.C. § 3730(b)(5).

III. Certiorari Is Needed To Protect The Integrity Of The Local Action Rule Of 28 U.S.C. § 1392.

The local action rule of 28 U.S.C. § 1392 is jurisdictional. It requires a court without jurisdiction over a local matter to transfer the case to a court of competent jurisdiction. The case before the Court involves property and claims involving the Colorado McElmo Dome Unit. The case is governed by Colorado law and involves real property interests in Colorado owned by the United States, Colorado and Montezuma County. The local action rule compels the transfer of the case from Texas to Colorado. The case involves disputes between McElmo Dome overriding royalty and royalty owners and the Unit Operator relating to operations of the Colorado Unit. The McElmo Dome Unit is physically located entirely within Colorado. The only Court of competent jurisdiction is the Colorado district court. Litigation involving the McElmo Dome Unit is a local action within the jurisdiction of the Colorado Courts and may not be heard, or transferred, to a Court outside Colorado. 28 U.S.C. § 1392. *Hayes v. Gulf Oil Corporation*, 821 F.2d 285 (5th Cir. 1987) and *Minichiello Realty Associates, Inc. v. Britt*, 460 F.Supp. 896 (D. N.J. 1978), *affirmed*, 605 F.2d 1196 (3rd Cir. 1979). All of the issues in the case involve Colorado real property interests. The failure to transfer the case jeopardizes any decision a Texas court could make. The law of the Fifth Circuit is that Colorado courts are not obligated to give full faith and credit to judgments from Texas courts ruling on real estate matters associated with the McElmo Dome Unit. *Hayes v. Gulf Oil Corporation*, 821 F.2d 285 (5th Cir. 1987). In

Hayes, the Fifth Circuit held that since the McElmo Dome Unit was located in Colorado and the property was exclusively within the jurisdiction of Colorado, that the Texas district court was required to dismiss or transfer the case to Colorado pursuant to 28 U.S.C. § 1631. The Court held that it was fundamental that a Texas Court, federal or state, cannot adjudicate title to land situated in Colorado. *Hayes*, 821 F.2d at 287, 290 (5th Cir. 1987).

The facts in *Hayes v. Gulf Oil Corporation*, 821 F.2d 285 (5th Cir. 1987) are identical with the facts involving Mr. Bailey. Mr. Bailey has overriding interests in federal and private oil and gas leases that were formerly included in the Yellow Jacket Unit Agreement. Mr. Bailey's overriding royalty interests in the Yellow Jacket Unit were unitized under Colorado law into the McElmo Dome Unit. Mr. Bailey has challenged the unitization process due to the fraud committed by Shell in seeking overriding royalty owner consent to the Unit. Certiorari is needed to correct the failure of the Fifth Circuit to transfer the case to the proper Court in Colorado pursuant to 28 U.S.C. § 1631.

IV. Certiorari Is Needed To Prevent Interference By The Texas Court With The Jurisdiction Of The Colorado District Court.

The Colorado federal court has sole jurisdiction of the ***Qui Tam Complaint*** by reason of 31 U.S.C. § 3730. Federal law allows the United States to maintain the seal of secrecy upon motion and good cause shown to the court. 31 U.S.C. § 3730(b)(3). The United States made the necessary showing to maintain the seal of secrecy from April 9, 2004 when the ***Qui Tam Complaint*** was filed until now. The Texas district court broke the seal of secrecy on April 1, 2005 when it disclosed the case filing to Shell's counsel.

The Texas district court broke the seal of secrecy on April 7, 2005 when it identified the names of the plaintiffs in the Colorado ***Qui Tam Complaint***. The Texas district court broke the Colorado federal court's seal of secrecy by its Order of April 12, 2005 that identified the Colorado plaintiffs in writing. The Texas district court broke the Colorado federal court's seal of secrecy when it ruled (June 7, 2005, 9a, 20a) to unseal the Motion for Extension of Time in Which to Elect to Intervene filed by the United States in the Colorado federal court. The Colorado federal court considered the United States' motion and granted the relief requested. The United States requested the materials filed in the case be kept under the seal of secrecy when it declined to intervene in the case. The Colorado federal court granted the request and the matters filed remain under seal; except for the document ordered to be made public by the Texas district court on June 7, 2005.

If Shell or their counsel desire to challenge the rulings of the Colorado federal court, appeal to the Tenth Circuit Court of Appeals is proper. If Shell or their counsel is dissatisfied with a ruling of the Tenth Circuit, the appropriate forum for appeal is the United States Supreme Court. Congress has not authorized the Texas district court to decide issues regarding Orders lawfully issued by the Colorado federal court. The Colorado federal court had, and has, sole jurisdiction of the matters contained in the ***Qui Tam Complaint*** pursuant to the authority of 31 U.S.C. § 3730(b)(5).

This Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectively submitted,

ROBERT B. PERRY
Counsel of Record
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Dallas, Texas 75206
(214) 363-0555
Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-20425

In re:

GERALD O. BAILEY,
for Himself and on Behalf of
United States of America, State of Colorado,
and Montezuma County Board of Commissioners,

Petitioner.

Petition for Writ of Mandamus to
the United States District Court
for the Southern District of Texas

(Filed Jun. 3, 2005)

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
Shell Western E&P Inc.,	§	
Plaintiff,	§	
	§	
versus	§	Civil Action H-05-1029
Gerald O. Bailey, *et al.*,	§	
	§	
Defendants.	§	

Order

(Entered Apr. 1, 2005)

1. By 3:00 p.m. on April 1, 2005, Bailey must deliver a copy of the sealed documents, filed March 24, 2005, to Shell. (5)

2. By April 4, 2005, Bailey must file the active pleadings of Shell, Bailey, and Bridwell from the Harris and Wichita County cases with this court.

3. Shell's motion to reschedule is denied. (5)

Signed April 1, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
Shell Western E&P Inc.,	§	
Plaintiff,	§	
versus	§	Civil Action H-05-1029
Gerald O. Bailey, *et al.*,	§	
Defendants.	§	

Order

(Entered Apr. 12, 2005)

1. By April 22, 2005, Bailey must:

   - Move before the District Court in Colorado to transfer the litigation to this court on agreement of the parties and the judges. Ptasynski and Gray are advise to join in the motion. Bailey must send a photocopy of the motion to Judge Lynn N. Hughes;
   - Call Assistant United States Attorney Andrew Bobb and inform him of the status of the case; and
   - Produce a chart of his view of how this case stands.

2. By April 13, 2005, Shell must furnish:

   - A schedule of all litigation beginning in 1990 that stems from this subject; and
   - Its organizational chart and history.

3. By April 22, 2005, Bailey must explain briefly why the earlier litigation does not bar him from bringing claims now that arose out of the same transaction.

4. Shell must respond to Bailey's brief by April 29, 2005.

5. By April 22, 2005, Bridwell must update the court on the status of moving the parties from the Dallas and Wichita-Falls proceedings to this court.

Signed April 12, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D

THE HARNETT LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
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1601 ELM STREET
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[Names Omitted In Printing]

May 27, 2005

Via Facsimile 713/250-3937

Darlene Hansen, Case Manager
United States District Clerk
P.O. Box 61010
Houston, Texas 77208-1010

Re: *Shell Western E&P Inc. v. Gerald O. Bailey, et al.*;
Civil Action No. 4:05-cv-01029
United States District Court, Houston Division

Dear Ms. Hansen:

I represent Bridwell Oil Company in the above-referenced case. In our initial conference, Judge Hughes requested that related cases be transferred to his Court. Two of my clients were willing to do so. Since their case was pending in a state court proceeding, we were not sure how to accomplish a transfer directly to Judge Hughes' Court, so we filed it as a new lawsuit, *Shores, et al. v. Exxon Mobile Corporation, et al.*, Cause No. 4:05-cv-10825. The new case was filed on May 23, 2005 in Judge Atlas' Court. I expect that Judge Hughes will want the new case consolidated with the *Shell* case pending in his Court. I

assume that can be done administratively which is why I am alerting you to the filing. However, if we need to file some type of formal motion, please let me know and we will do so.

If you have any questions, please call me at your convenience.

Very truly yours,

/s/ Jim Hartnett, Jr. (tn)
Jim Hartnett, Jr.

JHJ/tn

cc: Don Campbell (*Via Facsimile* (214) 630-9996)
Robert Perry (*Via Facsimile* (214) 369-3590)
Phillip B. Dye, Jr. (*Via Facsimile* (713) 758-2346)
Andrew A. Bobb (*Via Facsimile* (713) 718-3303)

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHELL WESTERN E&P, INC.	*	H-CV-05-1825
	*	Houston, Texas
VS.	*	
	*	June 7, 2005
GERALD O. BAILEY, ET AL	*	4:48 p.m.
	*	

HEARING

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
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Jennifer Davidow and
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* * *

[5] THE COURT: Why did you feel obliged to tell me about Judge Benton's sister?

MR. PERRY: It was Judge Benton that brought up his sister.

THE COURT: That wasn't a need to tell me. Judge Benton was being forthright, candid, upfront, lucid, factual, as he always is, and then you turn around and file that under seal like – and I forget there were some other insulting things said. Is there a reason I shouldn't unseal that magic document?

MR. PERRY: Yes, Your Honor. There is material in that that remains under seal by the Denver court in Colorado.

MR. DYE: Your Honor, when the mandamus was filed, Mr. Perry hand delivered to the Court on Friday before Memorial Day and he mailed it to us the same day. So when we got a call from the Court at 4:00 o'clock, we had a copy service go down and copy the entire file. We – just so you know, we have a copy of the motion that was filed under seal because he filed it with the Fifth Circuit, even though in our service copy didn't have it, we copied their file. We've had it, we've seen it. And so I don't want you to be under any misimpression, which we also informed the Fifth Circuit of. In our response to the motion for mandamus, we footnoted the fact that we did have [6] a copy of it.

THE COURT: Did you file it in the Court of Appeals?

MR. PERRY: Under seal.

THE COURT: How did it become available for them to download it?

MR. PERRY: I have no idea, Your Honor.

THE COURT: And what is it in here that is still secret?

MR. PERRY: The material that is attached to it is still under seal. The attachment from the –

THE COURT: I didn't ask you whether it was under seal. I want to know what's the secret.

MR. PERRY: It's under seal by the – in that court.

THE COURT: What is proprietary, dangerous – what is in here?

MR. PERRY: I didn't put it under seal. The United States filed it under seal, and the Denver court, Judge Walker Miller, maintained the seal. Apparently, the Fifth Circuit broke the seal.

THE COURT: Judge Miller sealed the supplemental notice of removal filed under seal in my court? How did he do that?

MR. PERRY: No, Your Honor. It was the [7] attachment by the United States filed under seal.

THE COURT: It's a motion for continuance.

MR. PERRY: I believe it's a motion for extension of time in which to elect to intervene.

THE COURT: It's a continuance.

MR. PERRY: Your Honor, that's what the United States asked for.

THE COURT: Where's the docket sheet?

So they sent it to you?

MR. PERRY: Yes, Your Honor.

THE COURT: U.S. Attorney's Office sent it to you?

MR. PERRY: Yes, Your Honor.

THE COURT: Well, I'm sorry. The complaint has been unsealed; right?

MR. PERRY: Yes, Your Honor.

THE COURT: And it makes no sense for six weeks after the complaint has been unsealed for a motion for more time to study the complaint to remain under seal. Do you know what the purpose of that is?

MR. PERRY: No, Your Honor. Only Judge Walker Miller knows why he did that. His order compels it to remain under seal.

THE COURT: The stuff in this court is unsealed. So Document 4 is supplement to the notice of [8] removal is unsealed.

Do we know – it looks to me like all that stuff is ripe.

MR. DYE: Yes, Your Honor. We have – we filed a motion to transfer under the first file rule. And I brought an extra copy of it if Your Honor wants it. Another two kilograms of paper. And although Ms. Davidow and I wrote it and it's very succinct. But, Your Honor, the position

we've taken up there is that under the first filed rule, either under the qui tam first filed rule or the common-law first filed rule, the first filed case is a Texas case because the cases uniformly throughout the country hold that you take your date of filing –

THE COURT: I know.

MR. DYE: Right. And the problem we had is we knew Your Honor had ordered a transfer, but we had to respond to the case up there.

THE COURT: No –

MR. DYE: So we filed the motion. Mr. Perry has just filed his response today, which basically attached a copy of the writ of mandamus. And basically –

THE COURT: You mean the application?

MR. DYE: The application.

THE COURT: Did you attach a copy of the denial?

* * *

[11] THE COURT: Where does Bailey live in Colorado now?

MR. PERRY: Lakewood, Colorado.

THE COURT: That's a suburb of Denver?

MR. PERRY: Yes, Your Honor.

THE COURT: Is he comfortably fixed?

MR. PERRY: No, Your Honor.

THE COURT: How does he afford eight years of litigation?

MR. PERRY: It's hard on him.

THE COURT: When did he move to Colorado, '92 or something?

MR. PERRY: '98.

THE COURT: '98. Mr. Hartnett, make an oral motion to consolidate the stuff you just filed with this one.

MR. HARTNETT: Yes, Your Honor, at this time Bridwell Oil Company moves to consolidate the filings by Gary Shores as trustee of the Alicia Bowdle Trust, that lawsuit was filed in Judge Atlas' court. We'd ask that it be consolidated in this court.

THE COURT: Just filed it in the court and then it randomly diverted somewhere.

MR. HARTNETT: Correct, Your Honor.

THE COURT: Any objection?

[12] MR. PERRY: Yes, Your Honor. I think there's a jurisdictional issue with that case; but I haven't seen it, so I don't really know yet what to say about it. But if it's a state case involving state claims of actions between state parties, I don't believe there's any jurisdiction.

THE COURT: Which you're not a party to it, so you have standing to object here would only be a procedural objection because of the confusion of this case, wouldn't it?

MR. PERRY: It would indeed cause a great deal of confusion with this case.

THE COURT: Any objection?

MR. DYE: Your Honor, I think I have to speak up at this point.

THE COURT: No. Any objection?

MR. DYE: Yes.

THE COURT: To the consolidation?

MR. DYE: Yes, Your Honor. That case, when we talked about it last time, what I thought was going to happen was that these parties would intervene into this case, which I think would be fine, but what has happened is he's filed a lawsuit between Texans on one side and Texans on the other with no pleading of federal –

THE COURT: Well –

MR. DYE: – subject matter.

[13] THE COURT: – who is the Et Al?

MR. DYE: Well, Shell is in it. There's no diversity jurisdiction, and he hasn't claimed any federal question. And so my fear is that the case having been filed without subject matter jurisdiction, any order entered in that case would be void; whereas, if they intervened into this case to which already has subject matter jurisdiction, then that would be okay.

MR. HARTNETT: That's what I was going to tell Your Honor. I agreed with Mr. Perry's view that it lacked jurisdiction, and I don't know if Your Honor has misapprehension of the existing case, but in your mandamus response, Your Honor commented about having diversity jurisdiction of the matter; and, therefore, it was better – I

can't remember exactly what Your Honor said, but Your Honor said something to the effect that it was – this was an appropriate court because Your Honor had diversity jurisdiction of the Bridwell, Bailey case, and I don't think that's correct. I don't think there's complete diversity in that case at all.

THE COURT: If it's not diverse on the plaintiffs – well, it doesn't matter. If I got jurisdiction –

MR. DYE: It's a federal question jurisdiction.

THE COURT: I knew that, but –

[14] MR. HARTNETT: Agreed. Bridwell is a Texas business, it's basically a partnership operating in Texas, and so –

THE COURT: Are all the partners Texans?

MR. HARTNETT: I believe that's correct.

THE COURT: Or any partner?

MR. DYE: Any.

THE COURT: Any partner.

MR. HARTNETT: And Shell is Texan. And, you know, at some point I'd like to have a discussion about this whole federal question issue of jurisdiction. But I was going to tell Your Honor that I do think there's a jurisdictional issue.

THE COURT: Why didn't you intervene? That would leave us with the original problem.

MR. HARTNETT: I'll tell Your Honor exactly why we didn't. We came up – we came upon what we

perceived to be a legitimate time crunch in that there are some state rules about when we had to refile after the Wichita Falls court or after Denton court ruled, and so we had like a day to do it and there are a number of procedural hurdles with respect to an intervention that don't apply to a new lawsuit. And so –

THE COURT: Without my permission?

MR. DYE: Yes.

[15] MR. HARTNETT: Well, I can't even remember –

THE COURT: Leave this pending and then move to intervene and then dismiss that.

MR. HARTNETT: We made the commitment that we will come here and we will intervene.

THE COURT: So I grant, you leave to intervene, which I thought I did last time, and then as soon as that's done, then dismiss.

MR. DYE: I think that's cleaner because my fear is we get to the end of the case and then over those parties that say, we never should, you know, if we won or if we lost, one of us would say there was no subject matter jurisdiction.

THE COURT: Whoever loses will say that even if it's not true.

MR. HARTNETT: Judge, I just want to be clear, though. We're going to do it because we said we would, and we think it's what Your Honor wanted.

THE COURT: I want the problem solved. Other people –

MR. HARTNETT: I don't think that solves the problem, and I guess that's the issue that, based on some of Your Honor's comments and the position of Vinson & Elkins, it seems, Judge, clear to us that this case was improperly removed. Your Honor has taken the position that [16] Bailey doesn't have the ability to file any federal claims. The only reason the case could get removed to Your Honor –

THE COURT: Look, most of the time somewhere in the neighborhood of 87 percent of my federal questions are people without a federal question. It's whether they claim a federal question, it's not whether they ultimately have one.

MR. HARTNETT: Understood.

THE COURT: The same way in diversity, state law, there's just a whole lot of claims made that – but the answer is not is Bailey right. It's –

MR. HARTNETT: I understand that.

THE COURT: – is did he raise one.

MR. HARTNETT: However, the way I was looking at it is Your Honor had, in the status conference, when I agreed that we would talk to our people and we agreed to move, Your Honor basically made clear that you thought it was most likely that Bailey didn't have these claims, and since that's the only basis for it to get here, then I see us jumping into a case where –

THE COURT: But again, it's –

MR. HARTNETT: Fair enough.

THE COURT: You certainly – the removal stuff and all and his counter, eight amended counterclaim or something, he's raised all these stink bombs and if you-all [17] want to go to Denver, that's fine.

MR. DYE: No.

MR. HARTNETT: Judge, I do not want to go to Denver.

MR. PERRY: I want to go to Denver, Your Honor.

THE COURT: Somebody, somewhere needs to gather unto – and I'm willing for Judge Benton to do it.

MR. HARTNETT: Well, that's where we think the case should be. We think it should have stayed there, and we think it should have gone back there, since it's a federal question.

MR. DYE: The case was improperly removed, but there is subject matter jurisdiction. But, Your Honor –

THE COURT: What I'd like for you to do, of course, I mean, this is a simple business problem, and I'd like for you-all to settle it without bothering Miller, Denton, Hughes, Hittner or anybody else, O'Connor, Smith, whoever you bother on the Court of Appeals. You know, business is better done without us.

MR. HARTNETT: Judge, I'm sorry. All I wanted to tell Your Honor was what our true view of what it is that we're being asked to do it. We're going to do it.

THE COURT: No. Let's do it and let's see if we can solve the problem. And, you know, I'm not superman. I may not be able to solve this problem.

[18] MR. HARTNETT: We will intervene –

THE COURT: And then dismiss Judge Atlas'.

MR. HARTNETT: We'll do that.

THE COURT: And you have permission to do it.

MR. HARTNETT: Okay. And just so we're clear, Judge, some of our people – and I did report this – some of the people that I represent that are completely unrelated to Bridwell and the Bridwell family were not willing to have their case, they were not willing to intervene here, and so there is one case left in Dallas.

THE COURT: All right. Now who are those just so we know?

MR. HARTNETT: That's the Armor case, it's Mr. Armor, Eastwood Capital, Josephine Reddy. That's it.

MR. DYE: That's it.

THE COURT: And you know all about that?

MR. DYE: We do, Your Honor.

THE COURT: Do you know all about that?

MR. PERRY: No, Your Honor, but I take Mr. Hartnett's word for it.

THE COURT: I just want everybody informed.

MR. HARTNETT: We gave them notice. We've consolidated two from Denton into the Armor case in the

Dallas District Court, and so now, Judge, that means, as I understand it, involving my clients there are two cases, [19] this case and the Dallas County case, and I think that's it.

THE COURT: But each – some of your clients are here and some are there?

MR. HARTNETT: Correct, Your Honor.

THE COURT: None in two places, that's what I was trying to –

MR. HARTNETT: That's correct, Your Honor.

THE COURT: And those are all about the Elmo – McElmo Dome, M-C-E-L-M-O.

MR. HARTNETT: Yes, Your Honor.

THE COURT: There was a class action somewhere in the Great Planes and why did that not resolve on very similar facts the legal issues here?

MR. HARTNETT: There were – we had the first filed class action, first class involving royalty owners, overriding royalty owners and royalty owners in Denton. And while that certification, it was certified by the Court while it was on appeal, a settlement class was created in Denver. And we did not participate in that settlement class because we viewed that the settlement class was really – it was a reverse auction, and so it did not adequately value the claims. And so our people were not, the people that we continue to represent were not parties, were not participants.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

SHELL WESTERN E&P INC., Plaintiff,	§	
versus	§	Civil Action H-05-1029
GERALD O. BAILEY, *et al.*, Defendants.	§	

Order

(Entered Jun. 9, 2005)

1. The motion to supplement the removal is unsealed.
2. By June 9, 2005, Bailey must supplement his response to the motion to dismiss in the District Court of Colorado.
3. Bridwell is granted leave to intervene.
4. The parties must file a spreadsheet – including the lease name, acres, date leased, and royalty term – and the unit agreement.
5. The parties must try to obtain an electronic copy of the documents filed in the state court. If they cannot, they must confer and file their copies of the significant live pleadings.
6. By June 22, 2005, Shell must file a clear complaint.
7. By June 29, 2005, the defendants must respond and counter-claim.
8. By July 12, 2005, Shell must move for summary judgment on the contract liability issue.
9. By August 12, 2005, the defendants must respond.

Signed June 8, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

GARY H. SHORES, *et al.*, Plaintiffs,	§	
versus	§	CIVIL ACTION 05-1825
EXXON MOBIL CORPORATION, *et al.*, Defendants.	§	

SHELL WESTERN E&P, INC., *et al.*, Plaintiffs,	§	
versus	§	CIVIL ACTION 05-1029
GERALD O. BAILEY, *et al.*, Defendants.	§	

Order of Consolidation

(Entered Jul. 19, 2005)

1. These cases are consolidated into the senior civil action. The case subsumed in the senior case by consolidation ceases to have an independent identity. The unified case will pend as Civil Action 05-1029, *Shell Western E&P, Inc., et al. v. Gerald O. Bailey, et al.* Use only this style and number.

2. The scheduling order in Civil Action 05-1825 is vacated.

Signed July 18, 2005, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20425

In Re: GERALD O BAILEY, for himself and on behalf of United States of America, State of Colorado, and Montezuma County Board of Commissioners

Petitioner

Petition for Writ of Mandamus to
the United States District Court
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 22, 2005)

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a motion for reconsideration, the motion is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the motion is DENIED.

( ) Treating the Petition for Rehearing En Banc as a motion for reconsideration, the motion is DENIED. The court having been polled at the request of one of the

members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the motion is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-6a

Judge Jones did not participate in the consideration of the rehearing en banc.